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No. 05-1382

FILED
MAY 25 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

—v.—

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF THE PLANNED PARENTHOOD RESPONDENTS

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Act:

"Partial-Birth Abortion Ban Act of 2003," Pub. L. No. 108-105, 117 Stat. 1201 1

Pursuant to Rule 15.8 of this Court, Respondents Planned Parenthood Federation of America, Inc. and Planned Parenthood Golden Gate ("Planned Parenthood") file this supplemental brief to bring to the Court's attention matter from the Brief for the Petitioner, *Gonzales v. Carhart*, No. 05-380 (*cert. granted* U.S. Feb. 21, 2006) ("*Carhart*") (May 22, 2006) ("*Carhart* Merits Brief"), which is relevant to the disposition of the instant Petition for a Writ of Certiorari (May 1, 2006) ("Petition").[1] In two respects, the *Carhart* Merits Brief reveals fallacies in the continued insistence of Petitioner Alberto R. Gonzales ("Government") that granting the Petition here is neither necessary, nor would assist the Court in resolving all of the issues raised in these challenges to the constitutionality of the "Partial-Birth Abortion Ban Act of 2003," Pub. L. No. 108-105, 117 Stat. 1201 ("Act").

First, in the *Carhart* Merits Brief, the Government acknowledges that all of the legal questions presented in the challenges to the Act may not be capable of resolution in *Carhart*. In urging the Court to hold this case pending its decision in *Carhart*, the Government argued that "the Court could exercise its discretion to reach the remedial question in *Carhart* . . . ." Petition at 7. Now, in the *Carhart* Merits Brief, it takes the opposite tack. It states that if the Court finds the Act unconstitutional in any respect, it should remand the case to the Eighth Circuit for consideration of the remedy issue. *See Carhart* Merits Brief at 12 ("Because that inquiry necessarily entails a statute-specific consideration of legislative intent, in light of an identified constitutional difficulty with the statute, it would be appropriate for the Court to leave that issue for remand . . . ."); *see also id.* at 49-50.

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[1] Respondents in *Carhart* have received an extension of time to August 10, 2006, to file their merits brief.

This very suggestion belies the assertion that *Carhart* can, and will, dispose of all the issues presented here. It also undermines the Government's claim that the Court need not grant review here because this case could be "held pending the Court's decision in *Carhart*, and then disposed of as appropriate in light of that decision." Petition at 8. If *Carhart* is remanded on the remedy issue, the Court will either need to await completion of that step before taking action on this Petition or grant the Petition to decide the remedy issue, which the Ninth Circuit already decided.

By granting the Petition, the Court could avoid these additional steps. The Ninth Circuit here—unlike the Eighth Circuit in *Carhart*—fully analyzed and decided the remedy question in light of this Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, __ U.S. __, 126 S. Ct. 961 (2006). It is ripe for review.

Second, in the *Carhart* Merits Brief the Government fully briefs the two legal claims—undue burden (which the Government now calls "overbreadth") and vagueness—that were not decided by the Court of Appeals in *Carhart*, or, in the case of the vagueness claim, even preserved for review.[2] *See Carhart* Merits Brief, Argument, Point II. While this Court can read the lower court rulings in this case with respect to those claims, unless certiorari is granted here, this Court will not have the benefit of the full record in this case on those claims, or the briefing of the attorneys that developed that record and litigated the claims.

Because this case is the only one where the Court of Appeals considered and decided the proper remedy in light of this Court's ruling in *Ayotte*, as well as the

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[2] *See* Brief of the Planned Parenthood Respondents in Response to Petition for a Writ of Certiorari (May 12, 2006), at 8.

undue burden and vagueness claims, the Court should grant the Petition and consider this case together with *Carhart*.

Respectfully submitted,

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